



DEPARTMENT OF THE ARMY
HEADQUARTERS UNITED STATES ARMY FORCES COMMAND
1777 HARDEE AVENUE SW
FORT MCPHERSON GEORGIA 30330-1062

REPLY TO
ATTENTION OF

AFLG-PRO (715)

14 Jul 99

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Contracting Information Letter (CIL) 99-32

1. Reference SARDA Memorandum, Military Dining Facility Solicitations and Contracts, dated 22 Mar 99 (encl 1). In Dec 98, the Department of Defense General Counsel (DODGC) for the first time adopted the prevailing General Accounting Office (GAO) view, and determined that the Randolph-Sheppard (R-S) Act is generally applicable to appropriated fund contracts for full food services (FFS) at military dining facilities. See memorandum, Applicability of the Randolph-Sheppard Act to DoD Military Dining Facilities, dated 12 Nov 98 (encl 2). The same opinion also stated that the R-S Act may not be applicable to more narrow dining contracts for so-called discrete services such as dining facility attendant (DFA) (i.e., less than full food services) that do not involve the full spectrum of military cafeteria-style dining operations. The implementing SARDA memorandum dated 22 Mar 99, released 21 Apr 99 (encl 1) specifically embraces this new DoD policy - effectively reversing earlier Army guidance to the contrary (see now-rescinded SARDA memos of 1 Aug 97, and 11 May 1998, regarding R-S policy guidance).

2. To ensure the current DoD and Army policy is being consistently implemented throughout FORSCOM, early planning is required by all parties involved in the procurement. When a contracting office learns of a requirement that involves military dining facilities (regardless of the anticipated scope), and prior to the synopsis stage, promptly provide the PARC Office the following information: (1) whether the requirement is generally satisfied by inclusion on the procurement list under Javits-Wagner-O'Day (JWOD) or,

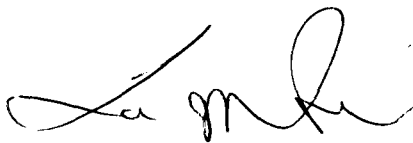
AFLG-PRO

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(2) whether the requirement has been satisfied in the past through set asides - small business or 8(a) programs, and (3) the precise scope of the requirement (e.g., FFS, DFA, etc.). Ensure the issues listed in enclosure 1 are addressed during the planning stage.

3. The DOCs are reminded that the R-S statutory preference, offered to state-registered blind vendors through the various State Licensing Agencies (SLAs), does NOT represent a part of the federal Javits-Wagner-O'Day (JWOD) program under Far Part 8 (Mandatory Sources). The R-S program-preference is employed only when the agency's acquisition strategy is to use full and open competition, rather than procure through FAR Part 8. There is no priority of use between R-S and JWOD. The ultimate decision on acquisition strategy for Army dining facilities contracts remains a subjective determination of the Contracting Officer, while taking into account each of the factors outlined in the SARDA policy memorandum at enclosure 1.

4. This CIL is a joint effort between the HQ FORSCOM legal office and our office and is being issued, in part, as an alert mechanism since copies of the 22 Mar 99 SARDA policy memo on R-S were not widely distributed at the contracting-activity level. For additional information, please contact Ms. Hamm, DSN 367-5632,.



TONI M. GAINES
Chief, Contracting Div, DCSLOG
Principal Assistant Responsible
for Contracting

2 Encls



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
US ARMY CONTRACTING SUPPORT AGENCY
5109 LEESBURG PIKE SUITE 916
FALLS CHURCH VA 22041-3201

22 MAR 1999



SARD-PS

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Military Dining Facility Solicitations and Contracts

The Department of Defense General Counsel (DODGC) has stated that the Randolph-Sheppard (R-S) Act is generally applicable to appropriated funded contracts for military dining facilities. The DODGC has also stated that the R-S Act may not be applicable to contracts for discrete services that do not involve the operation of dining facilities, as stated in the enclosed memorandum. Accordingly, this memorandum rescinds my previous policy guidance memoranda, dated August 1, 1997, and May 11, 1998.

We are continuing our efforts to draft new guidance that will clarify the relationship between the contracting preferences established by the Javits-Wagner-O'Day Act (JWOD) and the Small Business Act. Further, we are simultaneously pursuing a legislative initiative to exclude military dining facilities from R-S applicability. However, in the interim, contracting activities shall follow the policies and procedures set forth in this memorandum when dealing with R-S Act issues.

Continue to notify this office of any military dining facility requirement. Provide notice early in the procurement planning stage, before the synopsis of the proposed solicitation. State whether the requirement is generally satisfied by inclusion on the procurement list under JWOD, or whether the requirement has been satisfied in the past through set asides – small business or 8(a) programs. Address the following issues during the procurement planning stage:

a. Does the R-S Act apply? The R-S Act may not apply when the contract is for discrete services rather than the overall operation of a dining facility. If the services to be provided are a limited number of discrete services (mess attendant or KP services) and military personnel retain the overall operation of the cafeteria, then the cafeteria is operated "in-house" and R-S does not apply. This analysis should be applied to situations where a single "umbrella" food service contract covers multiple dining facilities. In applying this analysis, consider the following factors: 1) the total number of meals



served by contractors versus the total served by military personnel, 2) the total number of contractor personnel versus total number of military personnel, and 3) the total number of contractor-operated facilities versus military operated facilities.

b. If R-S does not apply, the solicitation will proceed according to the FAR and applicable supplements.

c. If R-S does apply, follow the procedures in AR 210-25, *Vending Facility Program for the Blind on Federal Property*, and inform the State Licensing Agency (SLA) of the requirement. To ensure maximum competition, ensure that the provision identifying the procurement as R-S applicable uses language that does not discourage small businesses from competing for the award.

d. Consider the SLAs as other than small businesses for the purpose of FAR Part 19, Subparts 702 and 708 and use the subcontracting plan as a source selection evaluation factor. In addition, if the prior contractor utilized a JWOD non-profit agency consider using a subcontracting plan that includes JWOD agencies as an evaluation factor.

e. Structure the source selection evaluation factors and subfactors such that only the proposals offering the best value will be included in the competitive range. Include only the most highly rated proposals in the competitive range. Apply the rules set forth in FAR 15.306(c) and use clause 52.215-1(f)(4) to limit the competitive range for purposes of efficiency. Establishing more than one competitive range is permissible provided it is consistent with the solicitation provision defining the competitive range(s).

f. For all existing contracts, not awarded pursuant to R-S, evaluate the services before exercising the options. If R-S Act would not apply, based on the DODGC guidance, then proceed in exercising the options. If the services being provided are subject to the R-S Act, then apply the procedures for implementing the Act and follow the guidance as above.

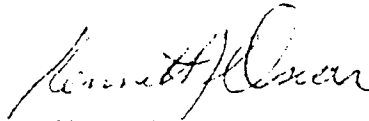
g. If the SLA is in the competitive range, all decisions to award to other than the SLA must be forwarded through this office for approval by the Secretary of Education prior to making the award.

h. Exercise options for pre-existing contracts in accordance with FAR 17.2

We suggest that contracting activities utilize performance-based SOW's with suitable quality assurance plans and performance standards.

Applying the R-S Act to military dining facility procurements may conflict with our obligations under the FAR implemented JWOD and small business programs. However, it must not result in contract awards that are unsatisfactory in terms of quality, timeliness, and cost.

My point of contact for additional information is Ms. Liz Smith, (703) 681-1048, DSN 761-1048, [mailto: smithek@hqda.army.mil](mailto:smithek@hqda.army.mil).

A handwritten signature in black ink, appearing to read "Kenneth J. Oscar". The signature is fluid and cursive, with the first name "Kenneth" being more prominent than the last name "Oscar".

Kenneth J. Oscar
Deputy Assistant Secretary of the Army
(Procurement)

Enclosure



GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
1600 DEFENSE PENTAGON
WASHINGTON, D. C. 20301-1600

12 NOV 1998

MEMORANDUM FOR GENERAL COUNSELS OF THE MILITARY DEPARTMENTS

SUBJECT: Applicability of the Randolph-Sheppard Act to DoD Military Dining Facilities

The applicability of the Randolph-Sheppard Act ("Act")¹ to contracts for the operation of military dining facilities involving appropriated funds has recently been the subject of discussion within the Department of Defense. This memorandum is issued to reiterate this office's opinion on this matter. As discussed below, it is my opinion that the Act is generally applicable to contracts involving military dining facilities. This opinion is based upon the plain meaning of the statute, Department of Education (DOE) guidance, and Comptroller General opinions.

The Act was enacted in 1936 as a program to provide opportunities for blind individuals to become economically self-sufficient. The original Act was very limited in scope and extended a priority to contracts in federal buildings for newsstands, snack bars, and the like. The Act was amended in 1974 to expand significantly the scope of contracts subject to the Act's priorities. The 1974 amendment specifically included "cafeterias" in the definition of vending facilities subject to the Act.² DOE, the agency charged with the administration and enforcement of the Act,³ has determined that, generally, military dining facilities are cafeterias and are indeed included within the scope of, and subject to, the Act.⁴ As recently as November 9, 1998, DOE confirmed the continuing vitality of its position in a letter to the Department of the Army.⁵

¹ Chapter 6A of Title 20, U.S.C.

² 20 U.S.C. 107(e)(7).

³ 20 U.S.C. 107(a).

⁴ See Commissioner, Rehabilitation Services Administration, Department of Education memorandum of August 14, 1997 to Committee for the Purchase from the Blind and Other Severely Handicapped; Commissioner, Rehabilitation Services Administration, Department of Education ltr of March 13, 1992 to Executive Director, Committee for Purchase from the Blind and Other Severely Handicapped ("Carney letter").

⁵ See Commissioner, Rehabilitation Services Administration, Department of Education ltr of November 9, 1998 to Assistant Secretary of the Army for Research, Development and Acquisition.



Multiple Comptroller General decisions and arbitral awards have supported this interpretation.⁶ For example, the Comptroller General held in a June 4, 1993 opinion that the military dining halls at Keesler Air Force Base were subject to the Act and dismissed protests made by a company seeking the contract under section 8(a) of the Small Business Act.⁷ Upon reconsideration, the Comptroller General specifically ruled that the Randolph-Sheppard Act trumps the Small Business Act.⁸ Later Comptroller General decisions assume that the Act is applicable to all contracts and do not distinguish between appropriated or nonappropriated funding.⁹ The Act itself does not refer to this distinction as germane to its applicability.

While DOE has consistently taken the position that military dining facilities are cafeterias and are generally subject to the Act, it has recognized that the Act may not be applicable in those instances where the contracts are for discrete services rather than the overall "operation" of the dining facilities.¹⁰ As the then-DOE Rehabilitation Services Administration Commissioner stated, "[I]f the food service contract calls upon the contractor to provide a limited number of discreet (sic) food services, and DOD personnel play an important role in the overall functioning of the cafeteria, DOD would be viewed as operating the cafeteria on an 'in-house' basis and, as a result, the food service contract would not conflict with the Randolph-Sheppard Act."¹¹ The

⁶ E.g., Grants Janitorial and Food Services, Inc., B-275157, Comp. Gen. (January 27, 1997); Triple P. Services, Inc.--Reconsideration, B-250465.8 et. al., Comp. Gen. (December 30, 1993); Department of the Air Force--Reconsideration, 72 Comp. Gen. 241 (1993); Louisiana Department of Social Services, Rehabilitation Services v. U.S. Department of Defense, Department of the Air Force, Case No. R-S/97-3 (1998)(Barron, Hilker, Mayer, Arb.).

⁷ Department of the Air Force--Reconsideration, 72 Comp. Gen. 241 (1993).

⁸ Triple P. Services, Inc.--Reconsideration, B-250465.8 et. al., Comp. Gen. (December 30, 1993).

⁹ See, e.g., Grants Janitorial and Food Services, Inc., B-275157, Comp. Gen. (January 27, 1997); Mississippi State Department of Rehabilitation Services, B-250783.8, Comp. Gen. (September 7, 1994); Good Food Service, Inc.--Reconsideration, B-256526.3, Comp. Gen. (July 11, 1994) (The Comptroller General noted in this opinion that in a prior decision he determined that the Act was applicable to appropriated fund procurements and stated, "We did not distinguish between appropriated and non-appropriated funds in the above decision because the procurement was conducted with appropriated funds. Thus, we were not called upon to discuss the application of the Randolph-Sheppard Act to a procurement not involving the expenditure of appropriated funds.").

¹⁰ Carney letter; Commissioner, Rehabilitation Services Administration, Department of Education undated ltr to Assistant Secretary of Defense (Force Management and Procurement).

¹¹ Carney letter, at page 3.

Commissioner noted that such determinations are fact-specific and must be made on a case-by-case basis.¹² A recent arbitration case involving the Air Force dining facilities at Barksdale Air Force Base is illustrative of such case-by-case decisions.¹³ The arbitrators determined that although the Air Force contracted out certain mess attendant functions, it retained the overall "operation" of the dining facility and operated it on an in-house basis.¹⁴ Thus, the contract was not subject to the priority provisions of the Act.¹⁵

In addition to the consistent advice of this office,¹⁶ on at least two occasions the Office of the Assistant Secretary of Defense (Force Management Policy) has issued policy statements that military dining facilities are indeed subject to the priority provisions of the Act.¹⁷ As the then-Deputy Assistant Secretary of Defense for Personnel Support, Families & Education stated in a January 19, 1993 letter to Congressman H. Martin Lancaster:

"After considerable review and discussions with DOE, I have concluded that, on balance, the provisions of the Randolph-Sheppard Act pertaining to cafeterias are applicable to the Keesler AFB dining facilities solicitation... Also, the priority given to blind vendors in the operation of cafeterias on federal property by the statute and DOE's regulations is not

¹² Carney letter, at page 2.

¹³ Louisiana Department of Social Services, Rehabilitation Services v. U.S. Department of Defense, Department of the Air Force, Case No. R-S/97-3 (1998)(Barron, Hilker, Mayer, Arb.)

¹⁴ Id. at page 11.

¹⁵ Id. at page 14.

¹⁶ See Deputy General Counsel (Personnel and Health Policy) memorandum of June 11, 1993 for Assistant General Counsel (Military Affairs), Department of the Air Force and Chief, General Litigation Division, Office of The Judge Advocate General of the Air Force; Deputy General Counsel (Personnel and Health Policy) memorandum of February 17, 1993 for Assistant General Counsel (Military Affairs), Department of the Air Force and Chief, General Litigation Division, Office of The Judge Advocate General of the Air Force.

¹⁷ See Deputy Assistant Secretary of Defense (Personnel Support, Families & Education) ltr of January 19, 1993 to Representative H. Martin Lancaster; Director, Personnel Support Policy & Services, ODASD (PSF&E) memorandum of August 7, 1992 for Associate Deputy Assistant Secretary of the Air Force (Contracting).

dependent on whether the cafeteria is an appropriated fund activity or a nonappropriated fund activity."¹⁸

The then-Director, Personnel Support Policy & Services (Personnel Support, Families & Education), Office of the Assistant Secretary of Defense (Management and Personnel) made the same point in an August 7, 1992 memorandum for the Associate Deputy Assistant Secretary of the Air Force (Contracting):

"The position advanced in your memorandum that the Randolph-Sheppard Act does not apply to the acquisition of contractual food services at military dining facilities is not supportable in light of the statute...and the implementing regulations....The provision in the Randolph-Sheppard Act for establishing a priority for the operation of the cafeterias by blind licensees is implemented whenever a solicitation for a cafeteria contract is contemplated by a federal manager. With the expansive definition of cafeteria in the regulations, the dining hall food service contracts are most definitely cafeteria contracts. Further, since the present issue concerns military dining halls, these contracts meet the other criteria of being contracts contemplated by federal property managers."¹⁹

Thus, the assertion that the Act does not apply to military dining facilities cannot withstand analysis. Accordingly, I request that, to the extent that your respective Military Departments may have taken contrary positions in pending arbitral or other proceedings, you promptly withdraw that position in favor of the DoD legal position set forth in this memorandum. Additionally, please take steps to ensure that your clients are advised of the Department's position and that all of your Service issuances and activities conform to that position.

Your cooperation is appreciated. If this office can provide further assistance, please contact Paul S. Koffsky, Deputy General Counsel for Personnel and Health Policy, or Commander M. D. Newman of his staff at (703) 697-9341.



Judith A. Miller

¹⁸ Deputy Assistant Secretary of Defense (Personnel Support, Families & Education) ltr of January 19, 1993 to Congressman H. Martin Lancaster at page 1.

¹⁹ Director, Personnel Support Policy & Services, ODASD(PSF&E) memorandum of August 7, 1992 for Associate Deputy Assistant Secretary of the Air Force (Contracting).

Copy to:**Acting ASD(FMP)****Executive Director, MWR & Resale Activities****Director, Defense Procurement, OUSD(A&T)****Judge Advocates General of the Military Departments****Counsel to the Commandant of the Marine Corps****Staff Judge Advocate to the Commandant of the Marine Corps**